PD-0704&0705&0706-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/5/2016 4:42:22 PM
Accepted 12/6/2016 10:15:20 AM
ABEL ACOSTA
CLERK

No. PD-0704-16
No. PD-0705-16
No. PD-0706-16

FILED
COURT OF CRIMINAL APPEALS
12/6/2016
ABEL ACOSTA, CLERK

In the
Court of Criminal Appeals of Texas
at Austin

THE STATE OF TEXAS,
APPELLANT

v.

GORDON HEATH ELROD,
APPELLEE

From the Court of Appeals for the
Fifth District of Texas at Dallas
In Cause Nos. 05-15-01219-CR, 05-15-01221-CR, & 05-15-01222-CR

STATE'S OPENING BRIEF

SUSAN HAWK
Criminal District Attorney
Dallas County, Texas

MESSINA MADSON
First Assistant Criminal District Attorney

BRIAN P. HIGGINBOTHAM
Assistant Criminal District Attorney
State Bar No. 24078665
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399
(214) 653-3625 | (214) 653-3643 *fax*
brian.higginbotham@dallascounty.org

Attorneys for the State of Texas

Identity of Parties and Counsel

Trial Judge: THE HONORABLE DON ADAMS
Criminal District Court No. 2
Dallas County, Texas

Appellant: THE STATE OF TEXAS

Represented by: Susan Hawk, *Criminal District Attorney*
Messina Madson, *First Assistant Criminal District Attorney*

Trial Counsel:
Renee Harris, *Assistant Criminal District Attorney*
Lori Ordiway, *Assistant Criminal District Attorney*

Appellate Counsel:
Brian P. Higginbotham, *Assistant Criminal District Attorney*

Dallas County District Attorney's Office
133 North Riverfront Boulevard
LB-19
Dallas, Texas 75207

Appellee: GORDON HEATH ELROD

Represented by: Trial Counsel:
Patrick Jordan

325 North St. Paul Street
Suite 2100
Dallas, Texas 75201

Appellate Counsel:
Lawrence B. Mitchell

11300 North Central Expressway
Suite 408
Dallas, Texas 75243

Table of Contents

Table of Authorities

Federal Cases

Texas Cases

Statutes

Other Publications

Statement of the Cases

Following a single transaction, Appellee was indicted on one count of fraudulent use or possession of identifying information and on two counts of tampering with a governmental record.[1] In all three cases, he brought identical motions to suppress claiming that the warrant affidavit did not state probable cause.[2] The trial court entered identical findings of fact and conclusions of law and granted his motions in all the cases.[3] The State filed a motion to reconsider the trial court's rulings, but the trial court declined to do so.[4] The State appealed to the Fifth District Court of Appeals, which affirmed the trial court's order.[5]

[1] 1 C.R. at 9; 2 C.R. at 9; 3 C.R. at 9.
[2] 1 C.R. at 29–32; 2 C.R. at 29–32; 3 C.R. at 29–32.
[3] 1 C.R. at 65–69; 2 C.R. at 33–37; 3 C.R. at 33–37.
[4] 1 C.R. at 70–71; 2 C.R. at 38–39; 3 C.R. at 38–39.
[5] *State v. Elrod*, Nos. 05-15-01219-CR, 05-15-01221-CR, 05-15-01222-CR, 2016 Tex. App. LEXIS 5706, at *1 (Tex. App.—Dallas May 27, 2016, pet. filed) (mem. op., not designated for publication).

Issue Presented

After an informant details an ongoing criminal enterprise and leads the police to her potential co-conspirators, can a magistrate find that her tip establishes a "fair probability" that evidence of the crime will be found where she suggests?

Statement of Facts

According to the search warrant affidavit, on April 27, 2015 at 5:23 p.m., Mesquite Police Officers Mobley, McCloud, Everett, and Berg were dispatched to One Star Food Mart to respond to a potential forgery.[6] When the officers arrived, they observed a heavy male walk out of the store to a white Cadillac.[7] Then the store clerk, later identified as Ahmed Kasumbi, walked outside, pointed to the Cadillac, and said to the officers, "That's them."[8] As Officer Berg approached the occupants, the Cadillac drove away, and the officers followed the Cadillac to Princeton Apartments.[9] Three suspects fled the parked Cadillac: two Hispanic males and one black male.[10] The officers located and detained the two Hispanic males.[11] While Officer Berg was at the suspect's vehicle, the black male returned to the Cadillac and said that the vehicle was his.[12]

While the officers were out with the suspects, Kasumbi called police dispatch and said that a female suspect had also been involved and that she was still at the store.[13] Officers Everett, McCloud, and Mobley returned to the store and made contact with Kasumbi.[14] Kasumbi told the officers that a female identifying herself as

---

[6] 1 C.R. at 63.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

"Elizabeth Bazan" had been to the store two days before and had tried to cash a check, purportedly from Texas Family Dental.[15] During the earlier visit, Kasumbi believed that the check was suspicious, so he told the woman that she could not cash the check, and she left.[16] Now, however, she had returned, and she was trying to cash the same check.[17] Kasumbi gave the officers the check the woman was trying to cash.[18] Officer Mobley contacted Texas Family Dental, and through them, he was able to contact Dr. Monica Bazen [sic], who worked at the office.[19] Dr. Bazen advised that she did not have any recent checks from Texas Family Dental and that she did not give anyone permission to cash a check with her name.[20]

The officers arrested the female suspect, who identified herself as Marsha Stovall.[21] On Stovall's person, they located a paper ID with her information; a notebook with several names, ID numbers, social security numbers, and addresses; a paper ID card for Elizabeth Bazan; several credit cards; a Texas driver license and a social security card for Lindsay Andricka; and a social security card for Monica Bazan.[22] The officers took Stovall into custody without incident.[23]

---

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] 1 C.R. at 63–64.
[23] 1 C.R. at 64.

The next morning, on April 28 at 8:30 a.m., Investigator Smith went to the Mesquite Jail to interview Stovall.[24] Investigator Smith read Stovall her *Miranda* warning, and she agreed to speak with him.[25] Stovall said that, for the last several days, she had been staying in room 119 at the Executive Inn located at 3447 East Highway 30 in Mesquite.[26] She advised that the counterfeit check, driver license, and social security card for Monica Bazan were all printed in that room.[27] She said that there are two desktop computers and four printers in the room.[28] Stovall added that Alisha Davis, her husband Gordon, and their two children were all staying in the room.[29] Stovall said that they had been printing counterfeit checks, driver licenses, and social security cards when she left the room at 5:00 p.m. on the previous day.[30] She also advised that Gordon and Alisha were mail thieves and that the counterfeited information was from stolen mail, which could also be found in room 119.[31]

Then, on April 27 [sic] at 7:00 p.m., Officers Berg and Walzel made contact with Gordon at room 119 at the Executive Inn.[32] The officers observed computers

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

and printers in the room.[33] Investigator Smith used all this information to obtain a search warrant from a Dallas County Magistrate.[34]

Appellee brought motions to suppress the evidence obtained during the search of room 119.[35] In the hearing below, Appellee argued that the warrant affidavit did not "sufficiently establish[] probable cause."[36] After taking the matter under advisement and hearing additional argument one week later, the trial court granted Appellee's motions.[37] The Court of Appeals later affirmed the trial court's order.[38]

Summary of the Argument

The magistrate correctly found probable cause within the four corners of the warrant affidavit for several reasons: (1) the tip came from a named informant, not an anonymous one, (2) it was made against Stovall's penal interest, (3) it was a detailed, first-hand account of criminal activity, and (4) it was consistent with information the officers observed for themselves.

---

[33] *Id.*
[34] *Id.*
[35] 1 C.R. at 29–32; 2 C.R. at 29–32; 3 C.R. at 29–32.
[36] 1 R.R. at 16.
[37] 1 C.R. at 65–69; 2 C.R. at 33–37; 3 C.R. at 33–37.
[38] *Elrod*, 2016 Tex. App. LEXIS 5706, at *1.

Argument

The magistrate correctly found probable cause within the four corners of the search warrant affidavit. The Court of Appeals erred in holding otherwise.

Standard of Review and Applicable Law

When a magistrate reviews a search warrant, the magistrate must determine whether the facts support probable cause considering "the totality of the circumstances."[39] The magistrate and all reviewing courts are limited to the supporting affidavit and the facts in its four corners.[40] Probable cause exists when there is a "fair probability" that contraband or evidence of a crime will be found at the specified location.[41] This is a flexible, non-demanding standard.[42] Neither federal nor Texas law defines precisely what degree of probability establishes probable cause, but a magistrate's action cannot be a mere ratification of the bare conclusions of others.[43] In considering the affidavit, the magistrate may read the facts in a commonsensical and realistic manner and may draw reasonable inferences based on those facts.[44]

After a magistrate issues a search warrant, the magistrate's perspective—and the magistrate's decision—steer the probable-cause question from there. In the trial

---

[39] *Swearingen v. State*, 143 S.W.3d 808, 810 (Tex. Crim. App. 2004).

[40] *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011).

[41] *Id.*

[42] *Id.*

[43] *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983)).

[44] *Id.*

court, the question is whether the affidavit contains sufficient facts, coupled with inferences from those facts, to establish a "fair probability" that evidence of a particular crime will be found at a given location.[45] Like the magistrate, the trial court is limited to the four corners of the affidavit.[46] As such, there are no credibility determinations to be made.[47] And in reviewing the facts of the affidavit, the standard is not de novo; rather, the magistrate's decision must receive "great deference."[48] The issue for the trial court "is not whether there are other facts that could have, or even should have, been included in the affidavit."[49] Instead, the court must "focus on the combined and logical force of facts that are in the affidavit, not those that are omitted from the affidavit."[50]

In addition, the trial court should not invalidate a warrant by reading it in a "hypertechnical" manner.[51] Rather, the trial court must continue to read the affidavit in a commonsensical and realistic manner, and it must defer to all reasonable inferences that the magistrate could have made.[52] In keeping with this deference, "the

[45] *Id.* at 62.
[46] *McLain*, 337 S.W.3d at 271.
[47] *Id.*
[48] *Jones v. State*, 364 S.W.3d 854, 857 (Tex. Crim. App. 2012).
[49] *Rodriguez*, 232 S.W.3d at 62.
[50] *Id.*
[51] *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013).
[52] *Rodriguez*, 232 S.W.3d at 61.

magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review."[53]

On appeal, the standard of review is much the same. The reviewing court must defer to the magistrate's decision and to any reasonable inferences the magistrate might have made.[54] The reviewing court has no duty to give deference to the trial court's decision.[55] Thus, although the trial court's decision is reviewed de novo, the magistrate's decision continues to receive "great deference."[56]

When it comes time for the magistrate to make a probable-cause decision, the magistrate must often consider whether to believe an informant—even a criminal informant. A known criminal is not untrustworthy per se.[57] Rather, the magistrate must weigh that informant's credibility like any other informant.[58] Although a criminal informant is not "considered inherently reliable" like an innocent citizen, other facts in the affidavit may lend credibility to the criminal informant.[59]

---

[53] *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010) (quoting W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(c) at 452 (4th ed. 2004 & Supp. 2009–10)).

[54] *Jones*, 364 S.W.3d at 857.

[55] *Rodriguez*, 232 S.W.3d at 63.

[56] *State v. Wester*, 109 S.W.3d 824, 826 (Tex. App.—Dallas 2003, no pet.).

[57] *See State v. Duarte*, 389 S.W.3d 349, 356–57 (Tex. Crim. App. 2012).

[58] *See id.*

[59] *Id.*

Analysis

Here, Marsha Stovall was that criminal informant.[60] In *Duarte*, this Court listed several factors that federal courts use to find probable cause based on a tip like Stovall's: "if the tip [1] is corroborated, [2] is a statement against penal interest, [3] is consistent with information provided by other informants, [4] is a detailed first-hand observation, or [5] is coupled with an accurate prediction of the subject's future behavior."[61] This Court added that Texas law applies the same principles.[62]

Deferring to all reasonable inferences the magistrate could have made, several of the *Duarte* factors support the magistrate's decision. This Court has instructed that a reviewing court must extend deference to the magistrate's decision, but the Court of Appeals did not do so.[63]

A. The tip came from a named informant, not an anonymous one.

Even before considering the substance of Stovall's tip, the tip is considered more reliable because it includes her name. Texas law has long distinguished between

---

[60] 1 C.R. at 63–64.

[61] *Duarte*, 389 S.W.3d at 356–57 (citing *United States v. Buchanan*, 574 F.3d 554, 562 (8th Cir. 2009); *United States v. Stewart*, 337 F.3d 103, 106 (1st Cir. 2003); *United States v. Canfield*, 212 F.3d 713, 720–21 (2d Cir. 2000); *United States v. Clyburn*, 24 F.3d 613, 618 (4th Cir. 1994); *United States v. Buckley*, 4 F.3d 552, 554, 556–57 (7th Cir. 1993); *United States v. Wilson*, 964 F.2d 807, 810 (8th Cir. 1992)).

[62] *See id.*

[63] *See Jones*, 364 S.W.3d at 857.

named informants and unnamed, confidential informants when it comes to probable cause.[64]

Confidential informants, on the other hand, face much more scrutiny. A tip by a confidential informant of unknown reliability, standing alone, will not support probable cause.[65] The confidential informant generally requires something else in order to make her tip reliable, such as detailed first-hand observations, or a statement against penal interest.[66] This Court has put it simply: "[c]itizen informants are considered inherently reliable; confidential informants are not."[67]

The Court of Appeals noted that "[i]dentification of the informant alone is insufficient" to establish probable cause.[68] While true, that observation has little bearing here because the affidavit relied on much more than just Stovall's name. Yet even without any other supporting facts, Stovall's tip begins on stronger footing because she was a named informant.

B. The tip was made against Stovall's penal interest.

Moving on to the substance of the tip, however, the magistrate could have concluded that the tip was more credible because what Stovall told the officer was against her penal interest. As the U.S. Supreme Court put it, "[p]eople do not lightly

---

[64] *See Rivas v. State (Rivas II)*, 446 S.W.3d 575, 579 (Tex. App.—Fort Worth 2014, no pet.).

[65] *Id.* (citing *Duarte*, 389 S.W.3d at 360–61).

[66] *Duarte*, 389 S.W.3d at 356–57.

[67] *Id.* at 357.

[68] *Elrod*, 2016 Tex. App. LEXIS 5706, at *8 (citing *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex. Crim. App. 1995)).

admit a crime and place critical evidence in the hands of the police in the form of their own admissions."[69] A statement against penal interest is deemed more reliable, even when it is made by a first-time informant.[70] This was another factor that supported Stovall's credibility.

To illustrate this point, the evidence described in the affidavit can be put into two groups: (1) facts learned before Stovall's interview and (2) facts learned during her interview.

Before the interview, as the warrant affidavit describes, Stovall was arrested after the police caught her trying to cash a suspicious check.[71] The police found on her person several pieces of identifying information that belonged to several different people.[72] She was then "booked in for Forgery with [sic] financial instrument and Fraudulent use/Possession of identifying information . . . ."[73] At this point, the police knew only that Stovall was trying to cash a suspicious check and that she possessed suspicious pieces of identification. They did not, however, know how or why those events came about.

---

[69] *United States v. Harris*, 403 U.S. 573, 583 (1971).

[70] *See Duarte*, 389 S.W.3d at 357 (citing *Mejia v. State*, 761 S.W.2d 35, 38 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd)).

[71] 1 C.R. at 63.

[72] 1 C.R. at 63–64.

[73] 1 C.R. at 64.

Only during Stovall's interview did those pieces of the story become clear. Back at the police station, an officer read Stovall her *Miranda* warnings, and she agreed to speak with him.[74] Stovall spoke candidly, and she filled in many gaps:

> Stovall went on to advise that she had been staying in room # 119 at the Executive Inn located at 3447 E Hwy 30 Mesquite, TX 75150 for the last few days prior to being arrested. Stovall advised that the counterfeit check, driver license and social security card . . . were all printed in the motel room. She advised that there are two desk top [sic] computers and four printers in the room. She advised that the occupants of the room were Alisha Davis, her husband Gordon and their two kids Jacob and Jeremiah. Stovall advised that they were printing counterfeit checks, driver licenses, and social security cards when she left the room on 4-27-15 at 1700 hours. Stovall advised that Gordon and Alisha are mail thieves and the information they counterfeited came from stolen mail which was also inside the motel room.[75]

Stovall, therefore, described their criminal enterprise from beginning to end. And she said all of this without any promise of leniency or a *quid pro quo* arrangement.[76] The magistrate could have reasonably concluded that sharing this information was against Stovall's penal interest—in other words, that she was more likely to face criminal penalties after she spoke to the officer than she had been beforehand.

The Court of Appeals, however, dismissed that reading out of hand:

---

[74] *Id.*

[75] *Id.*

[76] *See, e.g., Van-Ness v. State*, No. 01-13-00607-CR, 2015 Tex. App. LEXIS 4666, at *8 (Tex. App.—Houston [1st Dist.] May 7, 2015, no pet.) (mem. op., not designated for publication) (holding that a statement against penal interest enhanced credibility when there was "no evidence in the record of a *quid pro quo* relationship"); *Quinn v. State*, No. 05-12-00049-CR, 2013 Tex. App. LEXIS 6167, at *4 (Tex. App.—Dallas May 17, 2013, pet. ref'd) (mem. op., not designated for publication) (holding that statements against penal interest enhanced credibility when there was "no promise of leniency").

> [T]he six statements from Stovall's interview deflect blame to appellee and his wife rather than further implicate Stovall in the events leading to her arrest. The "combined logical force" of Stovall's statements did not indicate any culpability on her part other than that already observed by police on the previous day.[77]

The Court of Appeals also commented that "the affidavit does not reflect whether or not Stovall made the statements against her own penal interest."[78] But that is not correct. The magistrate could have made several inferences, any of which would have made her tip more credible.

First, and most immediately, when Stovall spoke with the officer, she had already been arrested for fraudulent use or possession of identifying information.[79] A person commits that offense if, with the intent to harm or defraud another, she obtains, possesses, transfers, or uses an item of identifying information of another person without the other person's consent.[80] True, the officers already established probable cause to arrest her. But the information she shared was still against her penal interest because she increased the likelihood that she could be found guilty at trial. If she ever decided to contest the charge later, she only made it more difficult for herself to do so. As the affidavit notes, "Stovall advised that the counterfeit check, driver license and social security card . . . were all printed" in room 119, where she had been

---

[77] *Elrod*, 2016 Tex. App. LEXIS 5706, at *10–11.

[78] *Id.* at *10.

[79] 1 C.R. at 64.

[80] Tex. Penal Code Ann. § 32.51(b) (West 2016).

staying for several days.[81] This statement at least offered evidence of her mental state of the use-or-possession offense, if it was not an outright confession.

Second, in addition to the use-or-possession offense, Stovall's interview also provided evidence that she had committed the offense of tampering with a governmental record. The Penal Code lists several ways that a person can commit the tampering offense, including the following: (1) making a governmental record with knowledge of its falsity, (2) knowingly making a false alteration of a governmental record, or (3) making any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record.[82] Before Stovall's interview, the police had good evidence of her possessing these documents. But during the interview, they learned that her role was larger—they gained evidence of her making the documents as well. If tampering charges were brought to trial, the factfinder could consider how long she had been at room 119 and her detailed knowledge of the operation. The factfinder could then take those facts as circumstantial evidence that Stovall had participated in making the documents and was, therefore, guilty of tampering.

Third, Stovall led the police to the scene of an ongoing crime and to potential co-conspirators.[83] The magistrate could have reasoned that Stovall directed the officers to room 119 knowing that, once they got there, they would uncover even

[81] 1 C.R. at 64.

[82] Tex. Penal Code Ann. § 37.10(a) (West 2016).

[83] 1 C.R. at 64.

more evidence against her. What is more, Stovall did not have any way of knowing what "Gordon" or "Alisha" might tell the officers and what evidence the couple might provide against her.

In short, the police would have had less evidence against Stovall if she exercised her right to remain silent. Because of the facts she offered up, any attorney defending her at a later date would have a more daunting task. Stovall, after all, was no criminal snitch who was out to save her own skin. The four corners of the affidavit offer no hint of any *quid pro quo* trade or the expectation of leniency.[84]

The magistrate might have decided that Stovall was unlikely to lead the police to incriminating facts unless she was telling the truth.[85] Reading the affidavit, that would be one possible inference—even the most obvious inference. Reasonable minds may differ, of course. The Court of Appeals chose another possible reading. And yet, weighing the affidavit, the magistrate could have concluded that the evidence against Stovall was stronger after she spoke to the police than it had been beforehand. Because that inference was reasonable, the Court of Appeals was bound to give deference to it.[86] The Court of Appeals erred when it did not do so.

[84] *See Duarte*, 389 S.W.3d at 356.

[85] *See Harris*, 403 U.S. at 583.

[86] *Jones*, 364 S.W.3d at 857.

C. The tip was a detailed, first-hand account of criminal activity.

Along similar lines, Stovall's tip was more credible because of the details she provided. This Court has pointed out that named informants who provide details go a long way towards establishing credibility: "when a probable cause affidavit specifies a named informant[,] . . . the affidavit is sufficient if it is sufficiently detailed to suggest direct knowledge on the informant's part."[87] And as the U.S. Supreme Court has held, the facts contained in the affidavit need only provide a fair probability that the informant obtained his knowledge through first-hand accounts.[88]

Stovall's tip had first-hand details in spades. As laid out above, Stovall outlined a criminal enterprise from beginning to end.[89] She gave the officer the who, what, where, and how of an ongoing offense.[90] These details were (at the very least) "sufficiently detailed to suggest direct knowledge" on her part.[91] The magistrate could have inferred that this level of detail made what Stovall said more credible.

D. The tip was consistent with information the officers observed for themselves.

Even so, the affidavit was based on more than Stovall's word alone. The officers also corroborated what Stovall said.

---

[87] *Matamoros*, 901 S.W.2d at 478.

[88] *See Gates*, 462 U.S. at 246.

[89] 1 C.R. at 64.

[90] *Id.*

[91] *See Matamoros*, 901 S.W.2d at 478.

In considering this point, it is useful to think of the facts in another two groups: (1) facts learned from Stovall's arrest and interview (which are discussed above) and (2) facts observed independently from Stovall.

After the affidavit describes what the officers learned from Stovall's arrest and interview, it describes the rest of the investigation. When the officers visited room 119, they contacted "Gordon" at the motel room, and they saw computers and printers inside—just like Stovall said they would.[92] The magistrate could have concluded that the officer's visit to room 119 made Stovall's tip more credible, and contributed to a "fair probability" that more evidence could be found in that room.[93]

The Court of Appeals, however, got bogged down with another issue. The warrant affidavit notes that Stovall relayed her tip "[o]n **4-28-15** at approximately 0830 hours . . . ."[94] Yet the next paragraph explains that the officers met "Gordon" at the motel one day earlier: "[o]n **4-27-15** at approximately 1900 hours . . . ."[95] According to the Court of Appeals, these dates show that "the police did not corroborate the information received from Stovall."[96]

---

[92] 1 C.R. at 64.

[93] *See Swearingen*, 143 S.W.3d at 810.

[94] 1 C.R. at 64 (emphasis added).

[95] *Id.* (emphasis added).

[96] *Elrod*, 2016 Tex. App. LEXIS 5706, at *11.

This may appear to present a chicken-or-egg problem, but which event occurred first does not matter. Finding the affidavit to be sufficient, the magistrate could have made one of two inferences.

On the one hand (despite the second date and time), the magistrate could have concluded that the events in the narrative continued chronologically, as they had throughout the affidavit. This would suggest that the officer simply made a typographical error. This Court has made clear that mere typographical errors affecting dates and times do not necessarily defeat warrant affidavits. In *Rougeau*, for example, this Court considered an affidavit that was dated January 6, 1977, instead of January 6, 1978.[97] Based upon that record, this Court noted that "the year that was placed on the arrest warrant . . . was clearly a typographical error."[98] And this Court observed that "[t]his kind of error will not vitiate either an arrest or search warrant."[99] Lower courts have continued to apply this rule, without question and without confusion.[100] If this was a typographical error, meaning that the narrative did continue

---

[97] *Rougeau v. State*, 738 S.W.2d 651, 663 (Tex. Crim. App. 1987), *overruled on other grounds by Harris v. State*, 784 S.W.2d 5, 19 (Tex. Crim. App. 1989).

[98] *Id.*

[99] *Id.* (citing *Lyons v. State*, 503 S.W.2d 254 (Tex. Crim. App. 1973); *Tyra v. State*, 496 S.W.2d 75 (Tex. Crim. App. 1973); *Moreno v. State*, 341 S.W.2d 455 (Tex. Crim. App. 1960); *Martinez v. State*, 285 S.W.2d 221 (Tex. Crim. App. 1955)).

[100] *See, e.g., Pachas-Luna v. State*, Nos. 01-14-00516-CR, 01-14-00517-CR, 01-14-00518-CR, 01-14-00519-CR, 01-14-00520-CR, 2015 Tex. App. LEXIS 10653, at *13–14 (Tex. App.—Houston [1st Dist.] Oct. 15, 2015, pet ref'd) (mem. op., not designated for publication) (holding that the magistrate could have reasonably inferred, based on the four corners of the affidavit, that the officer made an typographical error with a single digit and mistakenly typed "98.194.180.196" instead of "98.194.180.106").

chronologically, then the officers did, in fact, corroborate Stovall's tip. That would be one permissible inference.

On the other hand (despite that the affidavit is otherwise ordered chronologically), the magistrate might have taken the dates at face value. If the officers visited the hotel room before they spoke to Stovall, then she would have corroborated what the officers observed, rather than the other way around.

As just noted, it does not matter which inference the magistrate chose. Corroboration could have flowed either way. If Stovall's tip came first, then her tip "[was] corroborated . . . ."[101] And if the other officers visited the motel room first, then Stovall's tip "[was] consistent with information [already] provided by other informants"—namely, the other officers.[102] This Court mentioned both situations in *Duarte*, and either situation would lend credibility to what Stovall said.[103] To put it another way, the magistrate could have believed that both Stovall and the other officers were telling the truth, even if the actual affiant mixed up his dates and times. That would have been a "commonsensical and realistic" reading of the affidavit.[104] The Court of Appeals should have deferred to it.[105]

---

[101] *Duarte*, 389 S.W.3d at 356.

[102] *Id.*

[103] *Id.*

[104] *Rodriguez*, 232 S.W.3d at 61.

[105] *See Jones*, 364 S.W.3d at 857.

Stovall led the police to room 119, the scene of an ongoing crime, and to potential co-conspirators who were inside.[106] She explained how the whole operation worked, volunteering that she had been on the scene for several days.[107] She said all of this even though she was already in custody for two forgery-related offenses.[108] And she said it without any promise of leniency or a *quid pro quo* arrangement. But even apart from that, the affidavit describes how officers made contact with a man named "Gordon" in the very room.[109] It also notes that those officers observed computers and printers while they were there.[110]

The magistrate then had to decide whether all of these facts met a standard, one that this Court has described as both flexible and non-demanding—that is, whether the information formed at least a "fair probability" that more evidence could be found at room 119.[111] The magistrate concluded that it did. Even if it were a close call, the Court of Appeals should not have substituted its judgment for the magistrate's. As always, "the magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review."[112]

---

[106] 1 C.R. at 64.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *McLain*, 337 S.W.3d at 271.
[112] *Flores*, 319 S.W.3d at 702 (quotation omitted).

The magistrate reasonably found that probable cause existed within the four corners of the warrant affidavit. The Court of Appeals erred in concluding otherwise.

Prayer

The State respectfully requests that this Court reverse the Court of Appeals and remand these cases for further proceedings.

Respectfully submitted,

SUSAN HAWK
Criminal District Attorney
Dallas County, Texas

MESSINA MADSON
First Assistant Criminal District Attorney

BRIAN P. HIGGINBOTHAM
Assistant Criminal District Attorney
State Bar No. 24078665
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399
(214) 653-3625 | (214) 653-3643 *fax*
brian.higginbotham@dallascounty.org

Certificate of Compliance

I certify that this brief contains 4,524 words. This word count includes all necessary parts outlined in Texas Rule of Appellate Procedure 9.4(i)(1), and it was conducted with Microsoft Word.

Brian P. Higginbotham

Certificate of Service

I certify that a true copy of this document was served on Lawrence B. Mitchell as appellate counsel for Gordon Heath Elrod and Lisa C. McMinn as State Prosecuting Attorney. Service was by email to judge.mitchell@gmail.com and to information@spa.texas.gov on December 5, 2016.

Brian P. Higginbotham